Neutral Citation Number: [2012] EWHC 3749 (Ch)

Case Nos: 1786 & 1794 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
IN BANKRUPTCY

RE BRIAN AND MARY PATRICIA O'DONNELL

IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building, Royal Courts of Justice,
7 Rolls Buildings, Fetter Lane,
London EC4A 1 NL

Date: 21/12/2012

Before :

MR JUSTICE NEWEY

- -

Between :

BRIAN O'DONNELL & MARY PATRICIA O'DONNELL	**Petitioners**
- and -	
THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND	**Respondent**

- -
- -

Mr Paul Burton (instructed by **Piper Smith Watton LLP**) for the **Petitioners**
Mr Gabriel Moss QC and Miss Hannah Thornley (instructed by **Berwin Leighton Paisner LLP**) for the **Respondent**

Hearing dates: 27-30 November and 3, 4 & 6 December 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Newey :

1. I have before me petitions presented on 27 March of this year by which Mr Brian O'Donnell and his wife Dr Mary Patricia O'Donnell ask for bankruptcy orders to be made against them.

2. The central question raised by the case is whether the "centre of main interests" (or "COMI") of the O'Donnells is (or at any rate was when they presented their petitions) in this jurisdiction. The O'Donnells maintain that the answer is "Yes" and, hence, that this Court should make bankruptcy orders. In contrast, the Bank of Ireland ("the Bank") disputes that the O'Donnells' COMI has ever been anywhere but Ireland and accuses them of "bankruptcy tourism". According to the Bank, bankruptcy orders should be made in Ireland.

Basic facts

3. Mr and Dr O'Donnell, who are both Irish citizens, have been married since 1976. Each has a professional qualification. Mr O'Donnell had qualified as an Irish solicitor by 1976, and in 1999 he set up his own practice, Brian O'Donnell Solicitors, in Dublin. Dr O'Donnell is a qualified psychiatrist, although she ceased to practise as such after her third child was born.

4. In the 1980s, the O'Donnells began to invest in property. Various investments were made by them (or entities associated with them) in Ireland. The properties acquired included office buildings and a car park in Merrion Square in Dublin, an office and retail building on South William Street in Dublin, shopping centre and restaurant units in Galway and residential properties in Dublin. They also bought, through a Luxembourg company called Greystoke SA, property in Courchevel in France.

5. Between 2005 and 2008, there were investments in London, Stockholm and Washington DC. 15 Westferry Circus in Canary Wharf was acquired in 2005, and 17 Columbus Courtyard, also in Canary Wharf, was purchased later in that year. In 2006, Sanctuary Buildings in Westminster was bought, and the Fatburen Building in Stockholm followed in 2007. In April 2008, 2099 Pennsylvania Avenue in Washington was purchased.

6. The investments in London, Stockholm and Washington were effected using single purpose vehicles; in Mr O'Donnell's phrase, the acquisitions were "made in separate silos". 15 Westferry Circus was acquired in the name of Hibernia (2005) Limited ("Hibernia"), 17 Columbus Courtyard in the name of Fourteen Ninety Two Limited ("Fourteen Ninety Two"), Sanctuary Buildings in the name of Redicent Limited ("Redicent"), the Fatburen Building in the name of Myrtleville AB ("Myrtleville") and 2099 Pennsylvania Avenue in the name of Vico 2099 LLC ("Vico 2099"). Hibernia and Fourteen Ninety Two are both incorporated in England and Wales, while Redicent is registered in Cyprus, Myrtleville in Sweden and Vico 2099 in Delaware. Mr and Dr O'Donnell became directors of all the companies.

7. With 17 Columbus Courtyard and the Fatburen Building, the O'Donnell family's interests were held through further companies. In the case of 17 Columbus Courtyard, a British Virgin Islands company now called Havergate Investments Limited

(formerly Columbus Courtyard Limited) was used. Vico Swiss Holdings AG, which is incorporated in Switzerland, was employed in relation to the Fatburen Building.

8. By 2005, the O'Donnells were using the name "Vico Capital". As the O'Donnells explained, "Vico Capital" is in essence a trading name, the name by which they have been known in the real estate market. In 2008, the O'Donnells registered "Vico Capital" in Ireland as a business name; the date of adoption of the name was given as 25 May 2005, and the relevant business was identified as a partnership owned by the O'Donnells. A company bearing the name "Vico Capital" had been incorporated in Ireland in 2000, but it does not appear to have traded.

9. There was a further Irish investment in 2006: in 84 Ailesbury Road, Dublin. Mr O'Donnell had also acquired, I think in about 2005, a 50% interest in a property in Dublin known as Merchants Arch.

10. The O'Donnell family came to own a substantial house near Dublin called Gorse Hill and a country estate, Gortdrishagh House, in Galway. A large house at 8 Barton Street in Westminster was bought for £10.5 million in August 2007. The O'Donnells also acquired Bentley, Daimler and Morgan cars.

11. Each of the properties mentioned in the previous paragraph was vested in a company. Gorse Hill is owned by Vico Limited, an Isle of Man company, Gortdrishagh House by an Irish company called Avoca Properties Limited ("Avoca") and 8 Barton Street by Vico Barton Limited ("Vico Barton"), incorporated in Jersey.

12. On 23 December 2010, the Bank issued proceedings against the O'Donnells in Ireland for more than €69 million. On 4 March 2011, a settlement agreement was concluded between the Bank and, among others, the O'Donnells pursuant to which the O'Donnells agreed to judgment being entered against them if, among other things, they failed to comply with a payment schedule. In the event, payments were not made in accordance with the schedule so the Bank applied for judgment. On 12 December 2011, judgment was given in the Bank's favour for €71,575,991.29 plus costs.

13. Shortly after this, the O'Donnells travelled to London in their Bentley. They spent Christmas at Gorse Hill with their children, but took the ferry from Dublin to Holyhead on 29 December 2011. They have not left England since except to attend hearings before the Irish High Court.

14. Early in January 2012, the O'Donnells consulted David Rubin & Partners, licensed insolvency practitioners. The possibility of an individual voluntary arrangement (or "IVA") was then explored, but the Bank rejected what was proposed.

15. By a letter dated 19 January 2012, solicitors acting on behalf of the O'Donnells had told the Bank that their clients' COMI was in London. Arthur Cox, Irish solicitors, replied on the Bank's behalf on 1 February asserting that the O'Donnells' COMI was "clearly the Republic of Ireland".

16. The petitions with which I am concerned were presented by the O'Donnells on 27 March 2012. On the same day, Chief Registrar Baister gave directions for the O'Donnells to file evidence in support of their contention that their COMI is in

England and Wales and for notice of the hearing of the petition to be given to their creditors. Thereafter, the Bank gave notice that it opposed the petitions.

17. On 25 May 2012, the Bank presented a bankruptcy petition against Mr O'Donnell in Ireland. A similar petition was presented against Dr O'Donnell on 7 June. Both petitions have been adjourned to await the outcome of the petitions that are before me.

18. In the course of this year, Mr O'Donnell has been examined as to his assets before Kelly J in the Irish High Court. The examination extended over four days in April and continued on 5 July.

19. The Bank considers that the sums it is owed account for some 91% of the O'Donnells' total indebtedness. Other creditors to whom Mr and Dr O'Donnell are both indebted include Allied Irish Bank, Anglo Irish Bank, Ulster Bank and MBNA. Mr O'Donnell also owes money to Shale Construction Limited (a construction company that was employed to carry out work at Merchants Arch) and Fleishman Hilliard (though this debt is apparently the subject of dispute).

20. The O'Donnells have four children. The eldest, Blake, is now 29, their second son, Bruce, is 27, their elder daughter, Blaise, is 25, and their younger daughter, Alix, is 20. At least three of them continue to live at Gorse Hill.

Legal principles

21. Article 3(1) of EC Regulation on Insolvency Proceedings 1346/2000 ("the Regulation") provides, so far as relevant, as follows:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings".

22. The concept of "centre of main interests" has an "autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation": see the judgment of the [ECJ] in *In re Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508 (paragraph 31).

23. Light is cast on the meaning of "centre of main interests" by recital (13) to the Regulation (see *Eurofood*, at paragraph 32 of the judgment, and *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] Bus LR 1582, at paragraph 47 of the judgment). Recital (13) states:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".

24. Recital (13) harks back to wording used in the Virgos-Schmit report (Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996). This report was designed to provide a commentary on a November 1995 Convention on Insolvency Proceedings. That Convention did not itself come into force, but it provided the basis for the Regulation.

25. The Virgos-Schmit report says this about the expression "centre of main interests" (in paragraph 75):

> "The concept of 'main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
>
> The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we shall see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.
>
> By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (eg consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.
>
> In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence".

26. It is apparent from this passage that the "interests" to which the Regulation refers were intended to be economic ones. A similar point is made in a work of which Professor Virgos was one of the authors. Virgos and Garcimartin, "The European Insolvency Regulation: Law and Practice", comments (in paragraph 50) that, in this context, "interest" "must be understood as referring to the debtor's *economic* affairs".

27. A further point brought out by Virgos and Garcimartin is that the Regulation is concerned with where decision-making takes place. The authors observe (in paragraph 50):

> "the '*administrative connection*' (which is established in the place of *management and control*) must take precedence over both the '*operational connection*' (which is established in the *place of business or operations*) and the '*asset connection*' (which is established in the place where the *property* is located)".

28. An important point in the context of the present case is that a COMI should be ascertainable by third parties. Recital (13) to the Regulation refers to a COMI being "ascertainable by third parties". That is in keeping with the importance that the Virgos-Schmit report attached to international jurisdiction being "based on a place known to the debtor's potential creditors".

29. Case law confirms the need for a debtor's COMI to be capable of ascertainment by third parties. In the *Eurofood* case, the ECJ observed (in paragraph 33):

> "That definition [i.e. recital (13) to the Regulation] shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply".

In *Interedil*, the ECJ said (at paragraph 49):

> "That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them".

30. There is also United Kingdom authority. In *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966, the leading English decision dealing with the construction of article 3(1) of the Insolvency Regulation, Chadwick LJ said (in paragraph 55):

> "In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory".

31. More recently, the extent to which a COMI should be ascertainable by third parties was considered by Deeny J in *Irish Bank Resolution Corporation Ltd v Quinn* [2012] NICh 1, [2012] BCC 608. He said (in paragraph 28 of his judgment):

> "It seems to me therefore that a debtor does not appear to be obliged to advertise his centre of main interest but nor may he hide it. It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor. To make the

> COMI available on the internet or through telephone directories or trade directories or otherwise generally available in the Member State in which he has established his centre of main interest would make it public. Something less than that may be enough if it is in the Member State where the debtor incurred the debts. Any finding will inevitably be fact sensitive. If, for example, he has moved his centre of main interest from one Member State to another that will inevitably make the task of a third party more difficult. The debtor's new COMI will have to be reasonably ascertainable to such third parties. If he chose to move from these islands to a Balkan member of the European Union or from Finland to the south of Spain, for example, it may be necessary for him to give notice to actual or potential creditors to render his COMI 'ascertainable to third parties'. A creditor could not be expected to search every 'phone book in Europe. The legal principle of interpretation must be applicable across the Member States. Given the considerable geographical spread involved across a large part of the continent it seems to me that a centre of main interest is not 'ascertainable' within the meaning of recital 13 of the EC Regulation if can only be ascertained by a third party employing private detectives to follow the debtor or otherwise investigate his whereabouts. Prima facie the debtor is under a legal obligation to repay his debts or, in the event of his insolvency, as much of them as can be payable from his remaining assets. It would be contrary to the purpose of the Insolvency Regulation to impose on actual or potential creditors the burden of expensive investigation procedures to establish a debt or a centre of main interest before themselves commencing insolvency proceedings in a Member State which might prove entirely futile if in the interval the debtor or another creditor had opened such proceedings in a Member State which in truth held his centre of main interest".

32. The fact that the Regulation is concerned with the *debtor's* interests means that activities that the debtor has undertaken exclusively on behalf of someone else cannot be relevant. It was on this basis that, in *Stojevic v Official Receiver* [2007] BPIR 141, Registrar Jaques said (at paragraph 56) that "it would be wrong to equate the indirect economic interests of the debtor with the interests of Stone & Rolls Ltd [a company of which the debtor was said to be 'effectively, a shadow director']". Registrar Jaques had said in paragraph 49:

> "if Stone & Rolls Ltd was a separate legal entity, as it undoubtedly was, the business that was being carried on at 32 Hans Road belonged to it and not to the debtor. If that is right, it follows, in my judgment, that what the debtor was doing, when he was conducting the company's business in the way that I have outlined, was carrying on the company's business and not his business".

It seems to me that activities of a debtor as a trustee of a trust in which he has no beneficial interest must similarly be unimportant as such.

33. There is no doubt that a person's COMI can change. In *Shierson v Vlieland-Boddy*, Chadwick LJ commented (at paragraph 55):

> "There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of 'administration of his interests'. He must be free to relocate his home and his business. And, if he has altered the place at which he conducts the administration of his interests on a regular basis, by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place, the court must recognise and give effect to that".

34. Since there is "no principle of immutability", it can be important to know at what date a person's COMI should be determined. In *Shierson v Vlieland-Boddy*, Chadwick LJ thought that, as regards bankruptcy petitions, the relevant date would usually be that of the hearing of the petition. He said (in paragraph 55):

> "A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition. But, in a case such as the present, where the issue arises in the context of an application for permission to serve the petition out of the jurisdiction, the time at which the centre of the debtor's main interests falls to be determined will be at the hearing of that application. Similar considerations would apply if the court were faced with an application for interim relief in advance of the hearing of the petition".

35. Subsequent decisions of the ECJ have, however, focused on the position when the request to open insolvency proceedings is made. Thus, in *Re Staubitz-Schreiber* (Case C-1/04) [2006] ECR I-701, [2006] BCC 639, where a debtor had moved from Germany to Spain after requesting the opening of insolvency proceedings, the ECJ concluded (in paragraph 29):

> "Art.3(1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened".

The ECJ's reasoning is to be found in the preceding paragraphs:

> "25 In the fourth recital in the preamble to the Regulation, the Community legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.
>
> 26 Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective crossborder proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged.
>
> 27 Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him.
>
> 28 The universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor's assets situated in another Member State constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor's assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened".

In the *Interedil* case, the ECJ referred to *Staubitz-Schreiber* and continued (in paragraph 55):

> "It must be inferred from this that, in principle, it is the location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction".

36. In the light of these cases, it is now apparent, I think, that a debtor's COMI falls to be determined as at the date of presentation of a bankruptcy petition rather than the date (if different) on which the petition is heard.

The parties' positions

37. It is common ground that the O'Donnells' COMI was in Ireland up to 2005. The O'Donnells contend that their COMI shifted to England at some point between March 2005 and August 2007, when 8 Barton Street was bought. Alternatively, the O'Donnells (so it is said) acquired a new COMI in England soon after the purchase of the Barton Street house. The O'Donnells' COMI must in any case, it is argued, have been in England by the end of December 2011, when (it is said) they turned their backs on Ireland for good.

38. The Bank, in contrast, maintains that the O'Donnells' COMI has been in Ireland throughout and that it is still there. According to the Bank, the O'Donnells' habitual residence was still in Ireland when the petitions before me were presented, and it was from there that their affairs, including any business activities, were run. Stressing the need for a COMI to be ascertainable, the Bank contends that creditors were not in a position to know of any English COMI. In the alternative, the Bank argues that the O'Donnells are seeking to abuse European Union law and that their petitions should be dismissed for that reason.

Witnesses

39. Mr and Dr O'Donnell each gave evidence.

40. I am afraid that I cannot regard Mr O'Donnell as a frank, or even a wholly truthful, witness. Matters casting doubt on his credibility include these:

    i) The Land Registry entries for 8 Barton Street refer to a 1997 restrictive covenant prohibiting use for any purpose except as a single private dwelling house. Asked about this in cross-examination, Mr O'Donnell was evasive, and he claimed that he could not say for certain whether he knew of the covenant and that he could not recall the solicitors instructed on the purchase informing him of the covenant. I find it inconceivable that Mr O'Donnell was not told of the covenant. That he was aware of it is further indicated by the fact that a letting agreement dated 18 February 2008 which Mr O'Donnell appears to have drafted (although he claimed not to recollect whether he had done so) included a covenant providing for use of 8 Barton Street as a residence only. The chances are, I think, that Mr O'Donnell inserted the covenant because he knew of the restrictive covenant affecting the property;

    ii) The statement of affairs filed with Mr O'Donnell's bankruptcy petition included questions relating to income. No income was disclosed. In response to the question, "Do you receive any other income, including state benefits or tax credits?", Mr O'Donnell said "No" even though he is paid some £120,000 a year as a consultancy fee by the company with responsibility for the management of 17 Columbus Courtyard. In cross-examination, Mr O'Donnell said that he misread the form or did not know how to answer the question correctly. I cannot regard either explanation as convincing, especially coming from an experienced solicitor;

    iii) Various statements showing the O'Donnells' assets were presented to the Bank between 2005 and 2011. The earliest, dated 13 February 2005, attributed

a value of about €7.5 million to "Art Collection, Antiques, etc"; the statement was prepared by Deloitte, but Mr O'Donnell is likely to have been the source of the figure. Several statements prepared in the following year by another chartered accountant, Mr Rory O'Beirn, put a figure of €5 million on "Art Collection, Antiques Collection"; the documents record their approval by Mr O'Donnell. By 2007, no specific figure was placed on the O'Donnells' art and antiques, but there was still reference to a "substantial art collection". In contrast, a statement as at 18 March 2011 valued "Personal Chattels" at just €150,000, and Dr O'Donnell described the €7.5 million figure as "absolutely out of touch with reality and completely wrong". The evidence thus suggests two possibilities: either that valuable items have been disposed of (which Mr O'Donnell denies) or that Mr O'Donnell was prepared to put forward misleadingly high figures to the Bank. Neither would reflect well on him;

iv) The position is comparable in relation to the values attributed in the statements to property investments. By way of example, the "Statement of Affairs of Mr Brian O'Donnell and Dr M P O'Donnell as at 30th November 2007" valued 17 Columbus Courtyard at £142 million, 15 Westferry Circus at £182 million and "UK Residential" (i.e. the Barton Street house) at £13 million. It is Mr O'Donnell's evidence, however, that he and his wife have no beneficial interest in these properties: trusts were declared in favour of their children in 2005 and 2007. The Bank challenges the relevant declarations of trust, but I am in no position to form any view on them. What I can say is that there once again appear to be two possibilities: either the trusts did not exist or Mr O'Donnell was willing to supply the Bank with misleading information;

v) A similar point can be made in relation to documents which Mr O'Donnell executed in connection with Hibernia in 2006. He confirmed in a charge that he and his wife were the "sole legal and beneficial owners" of the share in Hibernia. He also certified that a document naming himself and his wife as Hibernia's shareholders was "a true, complete and accurate list of the … shareholders of the Company and of their shareholdings in the Company and where held as nominee details of the beneficial owner thereof is listed therewith". On Mr O'Donnell's case, however, the share in Hibernia was held on trust for his elder son, Blake;

vi) During his oral evidence, Mr O'Donnell said that he thought that the Bank had been aware of the trusts he alleges. That cannot be true. Mr O'Donnell has himself given evidence to the contrary. In a witness statement of 6 March 2012, Mr O'Donnell said of the share in Hibernia which is allegedly held on trust:

> "The beneficial ownership of the Share has not previously been disclosed to the [Bank]. It is not apparent from [Hibernia's] books or records which only disclose [Hibernia's] registered shareholders".

Mr O'Donnell attributed his changed evidence to having "heard from an accountant who dealt with the bank that they were aware". It seems to me, however, that Mr O'Donnell must know that the Bank was ignorant of the trusts;

vii) Mr O'Donnell said in cross-examination that he had "no idea" whether IVAs exist under Irish law. That seems most unlikely to me;

viii) Mr O'Donnell claimed in cross-examination that all his and his wife's creditors (and not merely the Bank and Allied Irish Bank) had been informed by letter of their move to the United Kingdom. For example, he said:

> "we wrote to our creditors and provided them with the information and asked them to redirect or to send or contact or phone us at all times in Barton Street".

I cannot accept this. Had it been the truth, the O'Donnells would have copies of the letters and would have exhibited them. Further, Mr Byrne of Shale Construction Limited confirmed that his company had not received such a letter;

ix) Early this year, an application for a practising certificate for 2012 was submitted to the Law Society of Ireland. Mr O'Donnell disavowed responsibility for the application even though it was signed by him. He said that it was pre-signed and explained:

> "the practice was that once these forms came to the office, they were signed and then put on file in case people were sick or away or not available or whatever, and the person who dealt with that as part of their function dealt with it in the normal way every year as part of the administration".

I do not find that account of events plausible. I find it very difficult to believe that the application was submitted without Mr O'Donnell's knowledge.

41. Dr O'Donnell was a more compelling witness. I found her evidence about her reasons for wishing to stay in London rather than return to Ireland, for instance, persuasive. Parts of her evidence were, however, less convincing. At points, I felt that she was reflecting the "party" line. Take Dr O'Donnell's evidence that "since 2005 our centre of main interests was London". It is surely inconceivable that Dr O'Donnell saw things in these terms at the time.

42. The Bank's witnesses included a number of employees: Mr Des Hanrahan, Mr John O'Beirne, Mr Eoin Geoghegan and Mr Andrew Fitzpatrick. The Bank called, too, Mr Declan Byrne, a director and shareholder of Shale Construction Limited. Mr Hanrahan had a tendency to argue the case rather than to confine himself to matters of which he had personal knowledge, but I have no reason to doubt his truthfulness. Mr O'Beirne, Mr Geoghegan, Mr Fitzpatrick and Mr Byrne also struck me as truthful and reliable witnesses.

The O'Donnells' COMI up to 2011

43. It seems to me that up to December 2011 the O'Donnells' economic activities were centred in Ireland, and that that is how creditors (and potential creditors) would have perceived matters. While it may not matter, I also consider that the O'Donnells' habitual residence was in Ireland.

44. So far as habitual residence is concerned, the O'Donnells plainly did not have a home in England before August 2007, when 8 Barton Street was bought. Even after that, their main home was, I think, in Dublin. While they may have been in England on days other than the specific dates identified by Mr O'Donnell in his evidence, they clearly spent far more time in Ireland than in England. That is unsurprising. Their children were still living at Gorse Hill, and the youngest of them, Alix, will have been no more than about 15 years of age in 2007. Since she had the misfortune to experience serious illness, the O'Donnells are the more unlikely to have wished to base themselves in England while she remained in Ireland. That the O'Donnells' principal home was still in Ireland is also indicated by the fact that they were on the electoral roll there and not in England; by the fact that they submitted tax returns there and not in England; and by the fact that their cars were registered there and not in England. It is also of significance that Mr O'Donnell spoke of Gorse Hill as "our home" in a radio interview on RTE Radio One on 17 December 2011.

45. Turning to economic activities, the O'Donnells (or at any rate Mr O'Donnell) doubtless spent a good deal of time in England on business between 2005 and 2011. The London investments (15 Westferry Circus, 17 Columbus Courtyard and Sanctuary Buildings) could be expected to have given rise to numerous meetings and other work in London, as could unsuccessful bids that were made in respect of other properties in London. I am also prepared to accept that the deals relating to the Fatburen Building and 2099 Pennsylvania Avenue will have involved some meetings and other activities in London and that, notwithstanding the restrictive covenant affecting it, 8 Barton Street was used not only as a home but for business purposes. It is noteworthy in this context that the evidence includes agreements giving the address of the O'Donnells (or Mr O'Donnell) as 8 Barton Street: for example, an asset management duty of care agreement dated 6 May 2010 and a confidentiality and proprietary information agreement of 24 May 2011. There is also reference to London in materials relating to Vico Capital: Vico Capital's address is given as 8 Barton Street on its website, a press release of 24 January 2011 described Vico Capital as "a private equity group based in London", an Ulster TV piece in October 2011 spoke of Vico Capital as "a London-based company", and I have seen headed paper for Vico Capital bearing the 8 Barton Street address.

46. On the other hand:

    i) Some materials relating to Vico Capital make reference to Ireland. Mr O'Donnell is described in items from the press quoted on the Vico Capital website as a "Dublin lawyer", "Dublin solicitor", "Dublin-based solicitor" and "Irish solicitor". The "Legal Notice" to be found on the website explained that the material on it "resides on a server in the Republic of Ireland" and that the law applicable to use of the material and disputes "is law of the Republic of Ireland". Further, although some headed paper for Vico Capital gives its address as 8 Barton Street, I have also seen such paper referring to 62 Merrion Square or 66 Lower Baggot Street in Dublin. A deed executed as of 20 December 2011 gave Vico 2099's address as "c/o Vico Capital, 66 Lower Baggot Street, Dublin 2";

    ii) Vico Capital shared office premises in Dublin with Brian O'Donnell Solicitors. Mr O'Donnell spoke of the building as "the back office of Vico

Capital", but there were no permanent staff anywhere else. Employees would come to London as needed, but no one was based there;

iii) Although several properties were acquired in London, they were not the only non-Irish investments. There were also properties in Stockholm, Washington and France;

iv) Mr O'Donnell maintained in evidence that he and his wife directed their business from London. I do not accept that. Mr O'Donnell himself said that he would conduct dealings from wherever he was at the time, and, as I have already said, he spent much more time in Ireland than in London. The majority of decisions are likely to have been made in Ireland;

v) Mr O'Donnell referred to having major business interests in London. All the London properties are, however, vested in companies, and work done as a company director essentially involves administration of the *company's* interests rather than the director's (paragraph 32 above). Further, the O'Donnells are said to have no beneficial interest at all in either 15 Westferry Circus or 17 Columbus Courtyard (see paragraph 40(iv) above). On this basis, it is hard to see how any activities in connection with those properties, subsequent to the dates of the declarations of trust, can matter to the O'Donnells' COMI. Take, for instance, Mr O'Donnell's role in relation to a refinancing of 17 Columbus Courtyard. On Mr O'Donnell's own case, he himself had no personal stake in that property. That implies that he cannot have been administering *his* interests;

vi) Brian O'Donnell Solicitors was a firm of Irish solicitors and had its offices in Dublin. Mr O'Donnell said that the firm was "very much secondary in [his] interests" from about 2005, but he remained the managing partner, as the firm's website confirmed;

vii) The O'Donnells were directors of a large number of Irish companies. A Dublin address (generally Gorse Hill) was given for the O'Donnells in each case;

viii) While the United Kingdom's Companies House records the O'Donnells' address as 8 Barton Street, it also states their country of residence as "Ireland";

ix) Dublin addresses (in particular, Gorse Hill) were given for the O'Donnells in numerous transactional documents. To take just a few examples, the February 2008 articles of agreement in respect of Shale Construction Limited's work at Merchants Arch specified Mr O'Donnell's address as 62 Merrion Square, an August 2009 facility letter stated the O'Donnells' address as Gorse Hill, the O'Donnells' address was given as 62 Merrion Square in a declaration of trust in respect of shares in what was then Fourteen Ninety Two Management Limited bearing a December 2010 date, and a bank mandate signed by Mr O'Donnell in July 2011 gave his address as Gorse Hill;

x) The various statements of assets prepared in respect of the O'Donnells in 2006 (as to which, see paragraph 40(iii) above) gave Gorse Hill as the O'Donnells' address;

xi) I do not accept the O'Donnells' evidence that they felt that their COMI was in England. They are most unlikely to have given any thought to where their COMI was until relatively recently, when addressing their financial difficulties;

xii) Mr Geoghegan, who was involved with the O'Donnells from April 2006 to early 2008, said that he "always understood [the O'Donnells] to be resident in Ireland and operating their property business from Ireland". Mr O'Beirne, who was the O'Donnells' main connection point with the Bank between mid-2008 and May 2010, said that "the Bank always viewed the O'Donnells as Irish borrowers, resident in and operating their affairs from Ireland". Mr Fitzpatrick, who had dealings with Mr O'Donnell between November 2007 and February 2010, said that he had not been made aware that the O'Donnells had been conducting their real estate business from London. He also said:

> "What I can say is it is the reasonable conclusions that I formed based on my interactions with [Mr O'Donnell] at the time, and that was conclusively that Mr and Mrs O'Donnell were Irish residents and spent substantially all of their time in Ireland and substantially all of the commercial substance of the transactions were undertaken in Ireland".

47. It is perhaps worth adding that, when he made his third witness statement on 26 July 2012, Mr O'Donnell did not himself suggest that he and his wife had had their COMI in London since a date between March 2005 and August 2007 (as is now contended). To the contrary, he said this (having referred to a previous witness statement):

> "I was not suggesting that my COMI was in London from the time that 8 Barton Street was acquired, but that it was my home address from the time that London became my COMI at the end of 2011/beginning of 2012".

48. Up to December 2011 at least, it seems to me that the impression given to third parties will have been that Mr O'Donnell was a Dublin-based businessman and solicitor who also had interests in England (as well as elsewhere). Dr O'Donnell would similarly, in my view, have appeared to be based in Ireland. That was also, I think, the reality. The O'Donnells conducted the administration of their economic interests principally from Ireland, and that was where their COMI was.

The O'Donnells' COMI since December 2011

49. If, as I have concluded, the O'Donnells' COMI was in Ireland up to December 2011, had the position changed by 27 March of this year, when the petitions before me were presented?

50. The O'Donnells each maintained in evidence that they had left Ireland permanently on 29 December 2011. Mr O'Donnell stated that he would not be going back to Ireland, where he and his wife had felt "really hounded". He explained:

> "we felt probably that there was nothing further that could be done in Ireland and that the pressure was intolerable".

For her part, Dr O'Donnell said that she and her husband have "decided to come and live in England and try and continue our lives here". "[G]iven," she went on, "the treatment that we've got in Ireland, it would be very uncomfortable for us living in Ireland any longer". According to Dr O'Donnell:

> "the onslaught and the negative publicity, et cetera, that the Bank of Ireland have generated against us in the media has created such an atmosphere of hate and nastiness that I think we no longer wish to live in Ireland".

Dr O'Donnell also said that she did not wish to live in a "bankocracy". The O'Donnells recognised that they will shortly have to move out of the Barton Street house (over which receivers have been appointed), but said that they would find alternative accommodation elsewhere in London.

51. On balance, I accept that the O'Donnells are intending to stay in London. Given the extent of press interest in them in Ireland, I can understand why they would decide to live in London, where they are far less well-known. The evidence on the topic from Dr O'Donnell, in particular, carried conviction.

52. That is not, however, to say that a change of COMI will have been apparent to third parties. Some of the matters to which the O'Donnells referred in evidence will not have been public knowledge at all. Third parties could not, for example, have discovered that the O'Donnells had applied to reserve a grave at Mill Hill Cemetery, shopped at Fortnum and Mason, visited the Tate Britain gallery, acquired a Westminster library card, eaten at a London restaurant or attended a performance at a London theatre. Nor will it have been apparent to creditors generally that the O'Donnells had consulted English insolvency practitioners (David Rubin & Partners) or English solicitors (Edwin Coe). Further, the Vico Capital website still included the references to Ireland mentioned in paragraph 46(i) above (as well as the Barton Street address – see paragraph 45 above).

53. As for material to be found on public registers, "Vico Capital" continued to be registered as a business name in Ireland on 27 March. The O'Donnells were by then recorded at the Irish Companies Registration Office as having resigned as directors of a number of Irish companies, but (a) so far as I can see, their resignations as directors of certain companies (including Avoca and Vico Capital) were not registered until after 27 March and (b) the United Kingdom's Companies House shows the O'Donnells as having ceased to be directors of any *English* companies by 27 March. Searches at the United Kingdom's Companies House would, moreover, still have given the O'Donnells' country of residence as Ireland. Further, the annual return filed in Jersey for Vico Barton in January of this year gave the O'Donnells' address as Gorse Hill, and, although the O'Donnells were entered on the electoral roll in this country by 27 March, they remained on the electoral roll in Ireland as well.

54. With regard to Mr O'Donnell's practice as a solicitor, Brian O'Donnell Solicitors had, it seems, ceased to exist by 6 February of this year. However, Mr O'Donnell was not practising in this jurisdiction: he said in a witness statement that he has been on the Roll of Solicitors of England and Wales since 2010, but (as he also said) he has not applied for a practising certificate.

55. As mentioned above (paragraph 40(viii)), it was asserted by Mr O'Donnell in cross-examination that all his and his wife's creditors (and not merely the Bank and Allied Irish Bank) had been informed by letter of their move to the United Kingdom. I do not accept, however, that that was the case.

56. In all the circumstances, I do not think that the COMI for which the O'Donnells contend (viz. England) was sufficiently ascertainable by third parties. To the contrary, it seems to me that an objective observer would have taken the O'Donnells' COMI to be in Ireland as at 27 March of this year. I find, accordingly, that the O'Donnells' COMI was in Ireland rather than England when the petitions with which I am concerned were presented. It follows that the petitions must be dismissed.

Abuse of European Union law

57. In the light of the conclusions I have arrived at above, I do not need to address the Bank's alternative submission that the O'Donnells are seeking to abuse European Union law.

Conclusion

58. I shall dismiss the O'Donnells' bankruptcy petitions.